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Legal aspects of electronic commerce

Electronic contracting: provisions for a draft convention

Note by the Secretariat

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I. Introduction

1. At the thirty-second session of the Commission, in 1999, various suggestions were made with respect to future work in the field of electronic commerce after completion of the model law on electronic signatures. It was recalled that, at the close of the thirty-second session of the Working Group, it had been proposed that the Working Group might wish to give preliminary consideration to undertaking the preparation of an international convention based on relevant provisions of the UNCITRAL Model Law on Electronic Commerce and of the draft model law on electronic signatures (A/CN.9/446, para. 212).[1] The Commission was informed that interest had been expressed in a number of countries in the preparation of such an instrument.

2. The attention of the Commission was drawn to a recommendation adopted on 15 March 1999 by the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT) of the United Nations Economic Commission for Europe (ECE).[2] That text recommended that UNCITRAL consider the actions necessary to ensure that references to "writing", "signature" and "document" in conventions and agreements relating to international trade allowed for electronic equivalents. Support was expressed for the preparation of an omnibus protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce.

3. Other items suggested for future work included: electronic transactional and contract law; electronic transfer of rights in tangible goods; electronic transfer of intangible rights; rights in electronic data and software (possibly in cooperation with the World Intellectual Property Organization (WIPO)); standard terms for electronic contracting (possibly in cooperation with the International Chamber of Commerce (ICC) and the Internet Law and Policy Forum (ILPF)); applicable law and jurisdiction (possibly in cooperation with the Hague Conference on Private International Law); and on-line dispute settlement systems.[3]

4. At its thirty-third session, in 2000, the Commission held a preliminary exchange of views regarding future work in the field of electronic commerce. The Commission focused its attention on three of the topics mentioned above. The first dealt with electronic contracting considered from the perspective of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "the United Nations Sales Convention" or "the Convention"). The second topic was on-line dispute settlement. The third topic was dematerialization of documents of title, in particular in the transport industry.

5. The Commission welcomed the proposal to consider further the possibility of undertaking future work on the those topics. While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group, the Commission generally agreed that, upon completing its current task, namely, the preparation of the draft model law on electronic signatures, the Working Group would be expected to examine, at its first meeting in 2001, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[4]

6. The Working Group considered those proposals at its thirty-eighth session, in 2001, on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); dematerialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91).

7. The Working Group concluded its deliberations on future work by recommending to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be begun on a priority basis. At the same time, it was agreed to recommend to the Commission that the Secretariat be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group, namely: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments, including, but not limited to, those instruments already mentioned in the CEFACT survey; (b) a further study of the issues related to transfer of rights, in particular, rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, paras. 94-127). The Commission endorsed those recommendations at its thirty-fourth session, in 2001.[5]

8. This note provides further information on the issues of electronic contracting, on which the Working Group held an extensive discussion at its thirty-eighth session (A/CN.9/484, paras. 94-127). Annex I to this note contains a preliminary draft of an international convention dealing with those issues. The form of a convention reflects a preliminary working assumption made by the Working Group, of which the Commission took note at its thirty-fourth session, in 2001,[6] that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce (ibid. para. 124). The form of an international convention would seem to be best suited to achieve the desired degree of legal certainty and predictability in international electronic commerce. Once the scope and the thrust of the uniform text has been considered, the Working Group would be in a better position to make a final decision on the form of the instrument. Annex II to this note reproduces, for the information of the Working Group, domestic and regional legislative provisions on matters excluded from the scope of electronic commerce legislation. In preparing this note the Secretariat held consultations with outside experts and other organizations interested in this topic, including the International Chamber of Commerce (ICC) and the Internet Law and Policy Forum (ILPF). The Working Group may wish to use this note as a basis for its deliberations.

II. Sphere of application of an international instrument on electronic contracting

9. The sphere of application of an international instrument on electronic contracting can be determined by geographic factors as well as by the subject matters to be covered (substantive field of application). The following paragraphs

discuss elements that the Working Group may wish to take into account when considering criteria for determining the sphere of application of the new instrument.

A. Substantive sphere of application

1. The notion of "electronic contracting"

10. Although frequently used in its deliberation, the expression "electronic contracting" has not been defined by the Working Group. Nevertheless, it appears from the deliberations of the Working Group that this expression has been used to refer to the formation of contracts by means of electronic communications, or "data messages" in the meaning of the subparagraph (a) of article 2 of the UNCITRAL Model Law on Electronic Commerce. This understanding of the expression "electronic contracting" is also consistent with the meaning given to this expression in legal writings. Indeed, "electronic contracting" is regarded as "a method for forming agreements, not a subset based upon any specialized subject matter".[7]

11. "Electronic contracts" are not believed to be "fundamentally different from paper-based contracts".[8] Nevertheless, electronic commerce does not fully reproduce contracting patterns used on contract formation through more traditional means. Thus, although an international harmonization effort to eliminate legal obstacles to the use of modern means of communication might not be primarily concerned with substantive law issues, some adaptation of traditional rules on contract formation may be needed to accommodate the needs of electronic commerce. If the Working Group confirms that this understanding of "electronic contracting" is correct, the new instrument would be primarily concerned with particular issues of contract formation raised by the use of data messages, but not with the material elements of offer and acceptance or the mutual rights and obligations of the parties under the contract. Substantive law issues arising under any given contract would continue to be governed by the applicable law. By the same token, the new instrument, even though dealing with the legal effect that data messages may have for the purpose of contract formation, would not otherwise deal with the validity of contracts. Matters such as the legal capacity of the parties and requirements for the validity of contracts would not be governed by the new instrument.

12. These assumptions have been reflected in paragraph 1 of draft article 1 (in both variants) and in draft article 3 of the preliminary draft convention contained in Annex I hereto. The Working Group may wish to consider whether its understanding of the expression "electronic contracting" is adequately reflected in those draft provisions.

2. Types of contracts to be governed

13. The Working Group held a preliminary discussion on the types of contracts to be covered by the new instrument. One of the views was that, given the urgent need for the introduction of legal rules required to bring greater certainty and predictability to the international regime governing Internet-based and other electronic commerce transactions, the Working Group should initially focus its attention on issues raised by electronic contracting in the area of international sales of tangible goods (A/CN.9/484, para. 95). However, the discussion held by the

Working Group does not appear to indicate that the new instrument should be solely concerned with the formation of sales contracts for tangible goods. Indeed, there was general agreement within the Working Group that "it might be useful to develop harmonized rules to govern international transactions other than sales of movable tangible goods in the traditional sense" (ibid., para. 115).

14. On the basis of the above understanding of the initial conclusions of the Working Group, the preliminary draft convention is not limited to sales contracts, but covers any contract "concluded or evidenced by electronic means". There are, however, two notable exceptions, as indicated below.

(a) Consumer contracts

15. The first limitation that results from the deliberations of the Working Group concerns consumer contracts. Although mindful of the practical difficulty of distinguishing certain consumer transactions from commercial transactions, the Working Group came to the preliminary conclusion that it should not focus its attention on consumer protection issues (ibid., para. 122). When the Commission endorsed the Working Group's recommendations, it was understood, inter alia, that the Working Group would not focus its work primarily on consumer transactions. That understanding is reflected in subparagraph (a) of draft article 2. The Working Group may wish to consider whether, as an alternative to an outright exclusion, the future instrument should follow the example of the UNCITRAL Model Law on Electronic Commerce, whereby an exclusion of consumer transactions is offered as an option for the enacting State.

16. One issue that may deserve further consideration by the Working Group concerns the manner in which an exclusion of consumer transactions should be formulated. At the thirty-eighth session of the Working Group it was suggested that the description of consumer transactions contained in article 2, subparagraph (a), of the United Nations Sales Convention might need to be reconsidered with a view to better reflecting electronic commerce practice (A/CN.9/484, para. 122). However, as no alternative was then proposed to the criteria used in subparagraph (a) of article 2 of the United Nations Sales Convention, article 2, subparagraph (a) of the preliminary draft convention uses the same criteria as the United Nations Sales Convention.

17. Another issue that the Working Group may wish to consider is whether under certain circumstances the consumer character of a transaction could be disregarded for the purpose of applying the new instrument. According to its article 2, subparagraph (a), the United Nations Sales Convention does not apply to sales of goods bought for personal, family or household use, "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use". According to legal literature, where the buyer does not inform the seller of such a purpose, the applicability of the United Nations Sales Convention depends on the ability that the seller had to recognize that purpose. In order to determine whether this possibility exists, elements such as the number or nature of items bought should be taken into account. It should be noted, however, that, as indicated in the commentary on the draft Convention on Contracts for the International Sale of Goods, which was prepared by the Secretariat (A/CONF.97/5), article 2, subparagraph (a), of the United Nations Sales Convention was based on the assumption that consumer transactions were

international transactions only in "relatively few cases".[9] Thus, the underlying assumption of article 2, subparagraph (a), of the United Nations Sales Convention is that consumer contracts would only exceptionally be covered by the Convention in cases where the consumer purpose of the transaction was not apparent.

18. The preliminary draft convention includes a provision along the lines of article 2, subparagraph (a), of the United Nations Sales Convention, without, however, the phrase "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use". The reason for such an exclusion is that it was felt at the Working Group's preliminary discussion on the matter that the words "ought to have known" in article 2, subparagraph (a), of the United Nations Sales Convention might be difficult to apply in practice to electronic transactions (A/CN.9/484, para. 120). Furthermore, with the ease of access afforded by open communication systems, such as the Internet, the likelihood of consumers purchasing goods from sellers established abroad is greater than in a paper-based environment.

19. The Working Group may nevertheless wish to consider whether additional provisions might be needed in the preliminary draft convention so as provide greater certainty as to whether a particular contract would fall under its scope of application, for instance, by requiring persons offering goods or services through open communication systems to provide means for persons contracting with them to state the purpose of the contract.

(b) Contracts relating to the grant of limited use of intellectual property rights

20. The second exclusion is not related to the purpose of the transaction but to the nature of the contract. From the discussion held by the Working Group on licensing arrangements (ibid., para. 116) and on transactions involving so-called "virtual goods" (ibid., para. 117), it appears that the initial assumption of the Working Group was that the new instrument should not be concerned with contracts having the primary purpose of granting a limited right to use a certain product, under conditions laid down in the relevant agreement, which the Working Group referred to as "licensing contracts" (ibid.).

21. It should be noted, however, that, as it appears from the initial deliberations of the Working Group, the criterion for establishing such a limitation would not be the nature of the goods being traded (whether tangible goods or "virtual goods"), but rather the nature of the contract entered into by the parties and their intention (ibid.). Under such an approach, a contract where the buyer or "user" is free from restrictions as to the use of the product (be it a tangible or a "virtual good") would normally be governed by the new instrument, even if such product incorporates patented or copyrighted work. In contrast, contracts where the agreement allows the producer or developer of the "virtual good" (or service) to exercise control over the product down through the licensing chain, the contract would remain outside the scope of the preliminary draft convention.

22. Thus, subparagraph (b) of draft article 2 excludes from the application of the preliminary draft convention "contracts relating to the grant of limited use of intellectual property rights". The Working Group may wish to consider whether the draft provision adequately reflects the understanding of the Working Group.

(c) Other exclusions

23. The Working Group may wish to consider whether other types of contracts should be excluded from the scope of application of the new instrument. With a view to facilitating the deliberations of the Working Group, Annex II reproduces, for illustration purposes, provisions of domestic or regional legislation that exclude certain matters from the scope of application of legislation adopted to facilitate the use of electronic commerce or, more generally, promote the use of electronic means of communication.

B. Geographic sphere of application

24. The sphere of application of the new instrument may either be limited to international contracts or cover any contract concluded or evidenced by data messages, regardless of the location of the parties. In the first case, the new instrument would need to establish criteria for determining when a contract is "international". Furthermore, a choice should be made as to whether the instrument would apply to any international contract or only to contracts that show connections to contracting States of the new instrument. These alternative approaches are discussed below.

1. "International contracts"

25. Most of the trade law instruments that have been prepared by the Commission apply only to "international" transactions. One notable exception, however, is the UNCITRAL Model Law on Electronic Commerce, which does not distinguish between domestic and international transactions, but offers the enacting State the option to limit the scope of application of the law to international transactions.

26. The international character of a contract may be defined in a variety of ways. The solutions adopted in both national and international legislation range from a reference to the place of business or habitual residence of the parties in different countries[10] to the adoption of more general criteria such as the contract having "significant connections with more than one State", or relating "to international commerce".[11]

27. At the thirty-eighth session of the Working Group it was suggested that, in view of practical difficulties in establishing the places of business of the parties, in the absence of a clear indication by them, other criteria should be used for establishing the geographic sphere of application of the future instrument, such as the place of contract formation (A/CN.9/484, paras.110-111). The Working Group agreed, however, that the place of conclusion of a contract, as traditionally understood in private international law, might not provide sufficient basis for a workable solution in an electronic environment (ibid., para. 112).

28. Indeed, rules on contract formation often distinguish between "instantaneous" and "non-instantaneous" communications of offer and acceptance or between communications exchanged among parties present at the same place at the same time (*inter praesentes*) or communications exchanged at distance (*inter absentes*). Typically, unless the parties engage in "instantaneous" communication or are negotiating face-to-face, a contract is formed either when acceptance is dispatched

to the offeror or when the offeror receives it. The place of contract formation can be relatively easily established once the place of dispatch or receipt are known.

29. In electronic commerce, however, it may be difficult to determine the place at which a message has been either dispatched or received. Transmission protocols of data message between different information systems usually register the moment when a message is delivered from one information system to another, or the moment when it is effectively received or read by the addressee. However, transmission protocols do not usually indicate the geographic location of the communication systems. It is not surprising, therefore, that article 15 of the UNCITRAL Model Law on Electronic Commerce refers to the notion of "place of business" when providing rules to determine the places of dispatch and receipt of data messages.

30. In the light of the practical difficulty of determining in advance the place of contract formation, this criterion has not been used to establish the sphere of application of the preliminary draft convention.

31. Other concepts proposed at the thirty-eighth session of the Working Group included the notion of "centre of gravity" of a contract (ibid., para. 112). However, a review of selected international instruments shows that references to the place that "has the closest relationship to the contract and its performance" or to other similar notions in most cases are only subsidiary means for determining a party's place of business, typically in case of plurality of places of business.[12] Furthermore, it is doubtful that the "centre of gravity" of a contract might always be apparent to the parties at the time the contract is concluded.

32. For the above reasons, paragraph 1 of variant B of draft article 1 refers to the places of business of the parties, as this criterion has traditionally been used in international instruments prepared by the Commission and by other international organizations, such as UNIDROIT.[13] Where a party has more than one place of business, paragraph 2 of draft article 7 refers to the place that has the closest relationship to the contract and its performance.

33. The preceding observations lead to the second question related to the geographic sphere of application of the new instrument, namely whether it should generally apply to contracts between parties whose places of business are in different States, or should it become applicable only when both such States are also States parties to the instrument. Such a requirement appears in article 1, paragraph (1), subparagraph (a) of the United Nations Sales Convention, but not in other UNCITRAL instruments, such as the United Nations Limitation Convention (see subparagraph (a) of article 2) or the UNCITRAL Model Law on International Commercial Arbitration (see paragraph (3) of article 1). In the interest of ensuring the widest possible application of the new instrument, draft article 1, variant B, does not limit the sphere of application to contracts between parties whose places of business are in contracting States.

2. Sphere of application independent of the location of the parties

34. Given the difficulties involved in determining the location of the parties, variant A of draft article 1 does not limit the sphere of application of the preliminary draft convention to "international" contracts. Under this variant, the draft convention would apply to any contract concluded or evidenced by data messages,

regardless of whether or not the parties have their place of business in different States.

35. Such an approach might have the practical advantage of obviating the need for establishing where the parties have their places of business in order to determine whether the instrument applies in any given case. Furthermore, under this approach, parties who conclude contracts electronically in a contracting State might benefit from the favourable regime of the new instrument even when entering into purely domestic transactions. This option might be particularly attractive for parties located in States that do not have legislation in force supporting the use of data messages in contract formation.

36. Variant A of draft article 1 recognizes, however, that States may wish to preserve the duality of regimes for domestic and international contracts. Accordingly, draft paragraph 3 makes it possible for a State to make a declaration to the effect that it will apply the instrument only to international contracts.

III. General provisions: location of the parties

37. The preliminary draft convention contains a number of general provisions, such as definitions and interpretation, which are customary in international instruments. From among the general provisions of the preliminary draft convention those dealing with the location of the parties may require particular attention.

A. General issues related to the location of the parties

38. One of the central concerns of the Working Group during its initial discussion of issues raised by electronic contracting was the need for enhancing legal certainty and predictability. In that context, it was proposed that, when considering a new international instrument on electronic contracting, the Working Group should envisage formulating rules that required the parties to a contract concluded electronically to clearly indicate where their relevant places of business were located (A/CN.9/484, para. 103). That proposition is reflected in draft article 14, paragraph 1, subparagraph b. The legal effect of such an indication is set forth in paragraph 1 of draft article 7, which establishes a presumption that a party's place of business is the one indicated as such by it. The combined application of the two provisions might be beneficial to enhance legal certainty in electronic transactions by facilitating the determination by the parties, at the time a contract is concluded, of matters such as whether or not the contract is international, whether or not it is covered by the new instrument and, possibly, which law governs the contract.

39. At its thirty-eighth session, the Working Group considered the question as to whether the parties should be allowed to freely select the regime governing their transactions by choosing the place they declared to be their place of business. Such a situation was seen as undesirable, to the extent that it would make it possible for the parties to transform purely domestic transactions into international ones, only for the purpose of avoiding the application of the law of a particular country (A/CN.9/484, para. 102). The Working Group may wish to consider whether specific provisions should be made to avoid situations where a party's indication of a place of business would serve no other purpose than to circumvent the new

instrument or trigger its applications in cases that would fall outside their scope (for example, in a purely domestic transaction, assuming that the new instrument would only apply to "international" contracts). A possible rule to that effect is proposed in the phrase within square brackets in article 7, paragraph 1, of the preliminary draft convention.

40. As regards the notion of "place of business" for the purposes of the new instrument, the preliminary draft convention follows the cautious approach taken by the Working Group at its thirty-eighth session, namely that "every effort should be made to avoid creating a situation where any given party would be considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means" (ibid., para. 103). Therefore, both variants of the proposed definitions of "place of business" (draft article 5, subparagraph (j), variants A and B) are based on the assumption that legal entities would be physically located at a certain place.

B. Particular considerations on electronic commerce

41. If the relevant place of business has not been clearly indicated by the parties before or at the time of conclusion of the contract, the question arises as to whether there exist circumstances from which the location of the relevant place of business can be inferred.

42. If the new instrument is to apply the generally-understood meaning of the notion of "place of business" under existing international instruments, such as the United Nations Sales Convention,[14] elements such as the location of the equipment and technology supporting an information system or the places from which such system may be accessed should not be regarded as controlling. Otherwise, a person's place of business for the purposes of the instrument might be different from the same person's place of business for other purposes. Furthermore, location of equipment and technology may not be adequate factors, since they do not provide sufficient indication as to the ultimate parties to the contract. For example, a contract on behalf of the seller may be automatically concluded with the buyer by the computer of the information services provider that hosts the seller's web site.

43. Nevertheless, it is conceivable that a legal entity's activities might be entirely or predominantly carried out through the use of information systems, without a fixed "establishment" or without any connection to a physical location other than, for instance, the registration of its articles of incorporation at a given registry. For these so-called "virtual companies" it might not be reasonable to apply the same criteria traditionally used to determine a person's place of business. The language within square brackets in paragraph 4 of draft article 7 recognizes that possibility by providing that, for legal entities that do not have a place of business, the location of the equipment and technology supporting the information system or the places from which such system may be accessed may be taken into account in order to establish where such a legal entity has its place of business.

44. In its preliminary exchange of views on this matter, the Working Group considered which elements, in an electronic environment, were suitable for inferring the place of business of the parties, in the absence of a clear indication by them to that effect. One solution proposed to the Working Group was to take into account

the address from which the electronic messages were sent. It was suggested that, in the case of addresses linked to domain names connected to specific countries (such as addresses ending with ".at" for Austria, ".nz" for New Zealand, etc.), it could be argued that the place of business should be located in the corresponding country.

45. However, that proposition was criticized on the ground that an e-mail address or a domain name could not automatically be regarded as the functional equivalent of the physical location of a party's place of business. It was said that it was common in certain branches of business for companies to offer goods or services through various regional web sites bearing domain names linked to countries where such companies did not have a "place of business" in the traditional sense of the term. Furthermore, goods being ordered from any such web site might be delivered from warehouses maintained for the purpose of supplying a particular region, which might be physically located in a State other than those linked to the domain names involved. It was pointed out, in that connection, that the system of assigning domain names for Internet sites had not been originally conceived in strictly geographical terms, which was evident from the use of domain names and e-mail addresses that did not show any link to a particular country, as in those cases where an address was a top-level domain such as ".com" or ".net", for example.

46. Paragraph 5 of draft article 7 reflects the preliminary agreement reached by the Working Group as to the limitations of regarding domain names and e-mail addresses alone as controlling factors for determining internationality in the Internet environment.

IV. Formation of contracts

47. Issues related to contract formation may be divided into two broad categories: (a) general issues of contract formation as known under contract law; and (b) issues specific to contracting through electronic means or rendered particularly conspicuous by the use of modern means of communication. With regard to the first category, the central question is how traditional notions such as offer and acceptance, timing of communications, and receipt and dispatch of offer and acceptance may be transposed to an electronic environment. The second category includes questions that, although not entirely new, go beyond the simple issue of functional equivalence. They include, for example, legal treatment of fully automated systems used in e-commerce, as well as additional rights and obligations that parties using such systems might have, above and beyond what would be normally expected in a paper-based negotiating scenario.

A. General issues

48. As an initial working basis, the rules on contract formation in the preliminary draft convention contain provisions that follow the rules on the formation of contracts set forth by the United Nations Sales Convention. The advantage of the Convention's rules on formation consists in their having demonstrated their workable character in an international environment beyond the confines of sales law. This is evidenced, inter alia, by the fact that they have been used as models in

the work of UNIDROIT which led to the "Principles of International Commercial Contracts".[15]

1. Offer and acceptance

49. Draft article 8 of the preliminary draft convention contains provisions intended to make it possible to determine the time of contract formation. They are based on similar provisions of the United Nations Sales Convention. However, the provisions in the preliminary draft convention do not deal with various other substantive issues dealt with in the United Nations Sales Convention, such as the substantive criteria that a declaration has to meet in order to be considered an offer or an acceptance. The reason for this limited approach is that the preliminary draft convention is not intended to deal specifically with sales contracts, nor is it supposed to reproduce or duplicate the entire regime of the United Nations Sales Convention or of other international treaties dealing with other types of contracts. Thus, the preliminary draft convention contains only those rules on contract formation that may be regarded as strictly necessary in order to achieve greater legal certainty in electronic contracting.

50. Such rules include firstly basic rules to allow the parties to determine clearly when a contract is concluded. They are contained in article 8 of the preliminary draft convention. In the consultations conducted by the Secretariat it has been suggested that the usefulness of the future instrument might be limited if it were not to address, for all contracts subject to its sphere of application, the issue of the time of contract formation.

51. Another of those basic rules is concerned with a party's intention to be bound, which distinguishes an offer from an invitation to make an offer (see article 9 of the preliminary draft convention). Article 14, paragraph (1) of the United Nations Sales Convention provides that a proposal for concluding a contract that is addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. Whether the parties negotiate by e-mail, electronic data interchange (EDI) or through more traditional means, the nature and legal effect of their communications will be established by their intention.

52. Where a specific rule on electronic contracting may be needed is in connection with article 14, paragraph (2) of the United Nations Sales Convention, which provides that a proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal. In a paper-based environment, advertisements in newspapers, radio and television, catalogues, brochures or price lists are generally regarded as invitations to submit offers (according to some legal writers, even in those cases where they are directed to a specific group of customers), since in these cases the intention to be bound is considered to be lacking. By the same token, the mere display of goods in shop windows and on self-service shelves are usually regarded as invitations to submit offers.

53. The situation becomes more complex when the parties offer goods or services through a web site. The Internet makes it possible to address specific information to a virtually unlimited number of persons and current technology permits contracts to be concluded nearly instantly. The Working Group was aware of this situation and

took the view that Internet transactions may not easily fit into the established distinctions between what might constitute an "offer" and what should be interpreted as an "invitation to treat" (A/CN.9/482, para. 125). If the principle of article 14, paragraph (2) of the United Nations Sales Convention is transposed to an electronic environment, a company that advertises its goods or services on the Internet or through other open networks should be considered as merely inviting those who access the site to make offers. Thus, an offer of goods or services through the Internet would not prima facie constitute a binding offer. Paragraph 1 of draft article 9 of the preliminary draft convention reflects this general rule.

54. The difficulty that arises in this context relates to the possible intention of being bound by an offer. One possible criterion for distinguishing between a binding offer and an invitation to treat may be based on the nature of the applications used by the parties. Legal writings on electronic contracting have proposed a distinction between web sites offering goods or services through interactive applications and those that use non-interactive applications. If a web site only offers information about a company and its products, and any contact with potential customers lies outside the electronic medium, there would be little difference to a conventional advertisement. Interactive applications, however, may enable negotiation and immediate conclusion of a contract (in the case of virtual goods even immediate performance), so that they might be regarded as an offer "open for acceptance while stocks last", as opposed to an "invitation to treat".[16] This proposition is reflected in paragraph 2 of draft article 9 of the preliminary draft convention.

2. Expression of consent

55. One of the fundamental objectives of the new instrument would be to clearly recognize that the parties to a contract may express their consent by means of electronic communications or other types of data messages. For that purpose, draft article 10 reproduces a rule contained in article 11 of the UNCITRAL Model Law on Electronic Commerce that "an offer and the acceptance of an offer may be expressed by means of data messages."

56. Some domestic laws based on the Model Law, such as the Uniform Electronic Commerce Act prepared by the Uniform Law Conference of Canada (hereafter referred to as "the Uniform Electronic Commerce Act of Canada") contain more detailed provisions on expression of consent in an electronic environment. Section 20, paragraph (1) (b) of the Uniform Electronic Commerce Act of Canada expressly refers to "touching or clicking on an appropriately designated icon or place on a computer screen" as a manner of manifesting consent. The Working Group may wish to consider whether such additional clarification would be required. In fact, it would appear that, to the extent that the new instrument might build upon the concept of "data message", following the example of the UNCITRAL Model Law on Electronic Commerce, the additional clarification might not be necessary.

57. Article 2 of the UNCITRAL Model Law on Electronic Commerce defines "data message" as "information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy". Unless the word "information" is given a restrictive interpretation, the result of any of the actions listed in section 20, paragraph (1) (b) of the Uniform Electronic Commerce Act of Canada

would in most cases be the sending of information in the form of data messages. For example, when a person clicks on a "I agree" button showed on a computer screen, information is sent to the other computer indicating that the relevant button was activated at the other end of the communication chain. Such information should be regarded as a "data message" within the meaning of this term in article 2, paragraph (a) of the Model Law.

58. It should also be noted that, when first considering this matter, the Working Group was of the view that the expression of consent through clicking would require particular attention. A note of caution was struck, however, as to the need to maintain a technology-neutral approach to the issues of online contract formation. The rules to be developed should be sufficiently general to stand the test of—at least some—technological change (A/CN.9/484, para. 126).

3. Receipt and dispatch

59. With respect to the issues of receipt and dispatch in the formation of contracts, it was generally agreed during the Working Group's preliminary discussions that any future legal instrument should preserve a degree of flexibility to endorse the use of electronic commerce techniques both in the situation where electronic communication was instantaneous, and in the situation where electronic messaging was more akin to the use of traditional mail (ibid. para. 127).

60. According to the United Nations Sales Convention, both the offer and the acceptance (at least in most cases) become effective upon their "receipt", as defined in article 24, according to which "for the purposes of this Part of the Convention, an offer, declaration of acceptance [. . .] 'reaches' the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address".

61. In respect of the traditional forms of communication, such as oral or paper-based communications, the above-mentioned provision does not seem to cause any problems. A question arises, however, as to whether article 24 can be applied to electronic forms of communications without creating problems. It appears that the issue is only one of defining the "receipt" of the electronic message. The UNCITRAL Model Law on Electronic Commerce deals with issues related to time and place of receipt and dispatch of a data message in its article 15. Those provisions seem to be sufficiently flexible to cover both situation where electronic communication appears to be instantaneous, and those where electronic messaging mirrors traditional mail.

62. It appears, therefore, that the United Nations Sales Convention, in particular its article 24, contains rules that, when supplemented by provisions along the lines of article 15 of the UNCITRAL Model Law on Electronic Commerce, can serve as a general model also in an electronic environment. Thus, draft article 11 of the preliminary draft convention reflects essentially the provisions of article 15 of the Model Law. The Working Group may wish to consider whether the rule proposed therein should be made more specific so as to be useful in electronic contracting practice.

4. Possible additional issues

63. Despite the success of the rules of the United Nations Sales Convention on offer and acceptance, which is due to their ability to transcend the traditional differences in the approaches taken by civil and common law, questions may be asked as to whether they deal exhaustively with all the issues relating to contract formation and, consequently, whether they can be resorted to when drafting general rules on electronic contracting. The question to be considered by the Working Group is, therefore, the extent to which there are additional issues that need to be addressed in the new instrument.

64. The rules set forth in the United Nations Sales Convention have been drafted mainly with a view to dealing with cases where a contract is formed through offer and acceptance. The fact that those cases do not cover all the ways by which an agreement can be reached becomes evident in view of the possible complexity of transactions that include a great deal of communication between the parties, and that do not necessarily fit within the traditional analysis of offer and acceptance. According to one school of thought, agreements reached without an offer and an acceptance being clearly discernible do not fall within the scope of the Convention and should, therefore, be dealt with by resorting to the applicable domestic law. Under such an approach, it might be impossible to use the body of the Convention's rules on formation of the sales contract as a model for an exhaustive body of rules on the formation of electronic contracts.

65. However, according to the majority of commentators, the United Nations Sales Convention covers the agreements reached without resorting to the traditional "offer-acceptance" scheme. The fact that the United Nations Sales Convention does not expressly refer to them is not due to their being excluded from the scope of the Convention, but rather to the fact that the drafters did not consider it necessary to address them specifically and to tackle the additional difficulties they might have encountered in trying to devise appropriate wording for those types of agreements. Thus, like any other matter which is governed by (albeit not expressly settled in) the United Nations Sales Convention, the issue of whether there is an agreement even without a clear offer and acceptance, has "to be settled in conformity with the general principles on which it is based" under paragraph 1 of article 7. Those principles include the principle of the consensual nature of the contract as well as the principle that the existence of the contract depends on whether it is possible to discern the minimum contents required for the conclusion of the contract (such as the elements defined in article 14 of the United Nations Sales Convention for the sales contract).

66. Irrespective of which of the two above-mentioned approaches is taken with regard to the United Nations Sales Convention, the Working Group may wish to consider whether specific rules are required in the context of electronic contracting to clarify the legal regime applicable to agreements reached in ways other than a discrete offer and acceptance.

67. In addition to questions related to how consent could be expressed, it was suggested at the Working Group's thirty-eighth session that the following issues, among others, need to be considered: (a) the acceptance and binding effect of contract terms displayed on a video screen but not necessarily expected by a party; and (b) the incorporation by reference of contractual clauses accessible through a

"hypertext link" (for an explanation of such links, see para. 46-5 of the Guide to Enactment of the UNCITRAL the Model Law on Electronic Commerce, as amended by Article 5 *bis*).

68. Neither of these issues are dealt with in the UNCITRAL Model Law on Electronic Commerce. Article 5 *bis* of the Model Law contains a general provision intended to uphold the legal effect of information incorporated by reference. However, the Model Law does not deal in detail with matters of contract law. Furthermore, neither the Model Law nor the United Nations Sales Convention expressly provide a solution for the well-known problem of "battle of forms".[17] "Battle of forms" or unexpected contractual terms may be a serious problem in the context of electronic transactions, in particular where fully automated systems are used and no means are provided for reconciling conflicting contractual terms.

69. However, the consultations conducted by the Secretariat have indicated that attempting to address issues such as battle of forms or unexpected contractual terms might well exceed the scope of the new instrument and should best be left for the applicable law. The Working Group may wish to consider whether the new instrument should include rules on these matters.

B. Special issues

70. Special questions posed by electronic commerce include the use of fully automated communications systems, the treatment of mistake or error, the information to be provided by the parties and the means for obtaining a record of the contract.

1. Automated computer systems

71. Automated computer systems, sometimes called "electronic agents" are being increasingly used in electronic commerce. While the UNCITRAL Model Law generally accommodates the use of fully automated systems, it does not deal specifically with those systems beyond the general rule on attribution in article 13, paragraph 2, subparagraph (b). When considering this matter at its thirty-eighth session, the Working Group was of the view that, while the expression "electronic agent" had been used for purposes of convenience, the analogy between an automated system and a sales agent was not appropriate. Thus, general principles of agency law (for example, principles involving limitation of liability as a result of the faulty behaviour of the agent) could not be used in connection with the operation of such systems. The Working Group reiterated its earlier understanding that, as a general principle, the person (whether a natural person or a legal entity) on whose behalf a computer was programmed should ultimately be responsible for any message generated by the machine (A/CN.9/484, para. 107). As a general rule, the employer of a tool is responsible for the results obtained by the use of that tool since the tool has no independent volition of its own. However, an "electronic agent", by definition, is capable, within the parameters of its programming, of initiating, responding or interacting with other parties or their electronic agents once it has been activated by a party, without further attention of that party.

72. Although the use of automated systems, for example, for issuing purchase orders or processing purchase applications seems to be compatible with the United

Nations Sales Convention, which allows the parties to create their own rules (article 9), it might be useful for the new instrument to make it clear that the actions of automated systems programmed and used by people will bind the user of the system, regardless of whether human review of a particular transaction has occurred.

73. An advantage of such a provision may be to facilitate the development of automatization for contracting purposes. At present, the attribution of actions of an automated computer system to a person or legal entity is based on the paradigm that an electronic agent is capable of performing only within the technical strictures of its preset programming. However, at least in theory it is conceivable that future generations of automated computer systems may be created with the ability to act autonomously, and not just automatically. That is, through developments in artificial intelligence, a computer may be able to "learn through experience, modify the instructions in their own programs, and even devise new instructions."[18]

2. Treatment of mistake and error

74. Closely related to the use of automated computer systems is the question of treatment of mistakes and errors in electronic commerce. Since the UNCITRAL Model Law on Electronic Commerce is not concerned with substantive issues that arise in contract formation, it does not deal with the consequences of mistake and error in electronic contracting.

75. However, recent uniform legislation enacting the Model Law, such as the Uniform Electronic Commerce Act of Canada and the Uniform Electronic Transactions Act, which was prepared by the National Conference of Commissioners on Uniform State Laws of the United States of America (hereafter referred to as "the United States Uniform Electronic Transactions Act") contain provisions dealing with errors made by natural persons when dealing with an automated computer system of another person. The relevant provision in the Uniform Electronic Commerce Act of Canada (section 22) and in the United States Uniform Electronic Transactions Act (section 10) set forth the conditions under which a natural person is not bound by a contract in the event that the person made a material error.

76. The Working Group may wish to consider whether it would be desirable for the new instrument to deal with mistakes and errors made by natural persons when dealing with automated computer systems. In particular, the Working Group may wish to consider whether provisions of this type would be appropriate in a business-to-business context. The rationale for provisions such as those contained in the Uniform Electronic Commerce Act of Canada and in the United States Uniform Electronic Transactions Act seems to be the relatively higher risk of human errors being made in transactions involving a natural person, on the one hand, and an automated computer system, on the other, as compared to transactions that involve only natural persons. Errors made by the natural person in such a situation might become irreversible once acceptance is dispatched. It should also be noted that international texts, such as the UNIDROIT Principles of International Commercial Contracts, deal with the consequences of errors for the validity of the contract, albeit restrictively (see articles 3.5 and 3.6). However, it could be argued that a provision of this type would interfere with well-established notions of contract law and might not be appropriate in the context of the new instrument. For these

reasons, the relevant provision in the preliminary draft convention (paragraph 3 of article 12) appears within square brackets.

77. A slightly different approach might be to envisage only an obligation for persons offering goods or services through automated computer systems to offer means for correcting errors, without dealing with the consequences of errors for the validity of the contract. Such an obligation, which is provided in article 11, paragraph (2), of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereafter the "Directive 2000/31/EC of the European Union"), is also contained in paragraph 2 of draft article 12.

78. Another issue that the Working Group may wish to consider is whether the new instrument should deal with errors made by the automated system itself. At its initial discussion of this issue, the Working Group was of the view that errors made by any such system should ultimately be attributable to the persons on whose behalf they operated. Nevertheless, the Working Group recognized that there might be circumstances that justified a mitigation of that principle, such as when an automated system generated erroneous messages in a manner that could not have reasonably been anticipated by the person on whose behalf the system was operated. It was suggested that elements to be taken into account when considering possible limitations for the responsibility of the party on whose behalf the system was operated included the extent to which the party had control over the software or other technical aspects used in programming such automated system. It was also suggested that the Working Group should consider, in that context, whether and to what extent an automated system provided an opportunity for the parties contracting through such a system to rectify errors made during the contracting process (A/CN.9/484, paras. 107 and 108).

79. However, in its review of domestic and regional legislation on electronic commerce, the Secretariat has not found any precedents of legislative provisions dealing with the consequences of errors made by the automated system itself. Thus, the preliminary draft convention, at this stage, does not include a provision on this issue. The Working Group may wish to consider whether such a provision would be needed.

3. System requirements

80. Another special issue raised by electronic contracting that was mentioned during the discussions in the Working Group relates to the ability of the receiving party to print the general conditions of a contract and the mechanisms offered for record retention (A/CN.9/484, para. 126).

81. Except for purely oral transactions, most contracts negotiated through traditional means would result in some tangible record of the transaction to which the parties can refer in case of doubt or dispute. In electronic contracting, such record, which may exist as a data message, may only be temporarily retained or may be available only to the party through whose information system the contract was concluded. Thus, some recent legislation on electronic commerce, such as the Directive 2000/31/EC of the European Union (article 10, paragraph 1), requires that a person offering goods or services through information systems accessible to the

public should provide means for storage or printing of the contract terms. This obligation is combined with that person's obligation to disclose some minimum information when negotiating electronically.

82. No similar obligations exist under the United Nations Sales Convention or most international instruments dealing with commercial contracts. Therefore, the Working Group may wish to consider, as a matter of principle, whether it would be appropriate to create specific obligations for parties conducting business electronically that may not exist when they contract through more traditional means.

83. The rationale for creating such specific obligations seems to be the interest of enhancing legal certainty, transparency and predictability in international transactions concluded by electronic means. The use of the Internet in international trade has become a reality and is expected to increase. It has made it possible for parties in different countries having little or even no prior knowledge or information about one another to enter into contracts nearly instantaneously. Thus, it may not be unreasonable to require certain information to be provided or technical means to be offered in order to make available contract terms in a way that allows for their storage and reproduction, in the absence of a prior agreement between the parties, such as a trading partner agreement or other type of agreements. This is the approach taken by some recent domestic and regional legislation on electronic commerce, such as the EU Directive 2000/31/EC of the European Union.

84. The Working Group may wish to note that special obligations of this type seem to have been developed to address consumer protection concerns. Nevertheless, it appears that they could be adapted to a business-to-business context.

V. Form requirements

85. Although the United Nations Sales Convention does not generally deal with issues of validity, as indicated in subparagraph (a) of article 4, it expressly deals with the formal validity of contracts for the international sale of goods. Indeed, article 11 establishes that "a contract for the international sale of goods need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." Thus, article 11 establishes the principle that the formation and the evidence of a contract subject to the Convention is free of any form requirement,[19] and, therefore, can be concluded orally, in writing[20] or in any other way.

86. The preliminary draft convention follows the general principle of freedom of form enshrined in the United Nations Sales Convention and extends it to all contracts falling within its sphere of application. However, it is recognized that form requirements may exist under the applicable law as writing or signature requirements, for example when a State party to the United Nations Sales Convention has made a reservation under article 96 of the Convention. Under that provision, "a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in

any form other than in writing, does not apply where any party has his place of business in that State."

87. Despite the wide acceptance that the UNCITRAL Model Law on Electronic Commerce has found, and the increasing number of States that have based their legislation on electronic commerce on the Model Law, an international instrument on electronic contracting could not be based on the assumption that the principles of the Model Law have already achieved universal application. It seems, therefore, necessary for the new instrument to establish the conditions under which form requirements may be met by equivalent electronic methods.

A. Writing and signature requirements

88. he preliminary draft convention reproduces the criteria contained in article 6 of the UNCITRAL Model Law on Electronic Commerce for the legal recognition of data messages as "writings".

89. As regards signature requirements, the Working Group may wish to consider whether the new instrument should limit itself to a general provision on the recognition of electronic signatures or whether it should spell out the conditions for the legal recognition of electronic signatures in a greater level of detail. Under the first option, the Working Group might wish to introduce in the new instrument a provision along the lines of article 7, paragraph (1), of the UNCITRAL Model Law on Electronic Commerce. That option is reflected in variant A of paragraph 3 of draft article 13. Under the second option, the Working Group might wish to use more detailed language along the lines of article 6, paragraph (3), of the UNCITRAL Model Law on Electronic Signatures. That option is reflected in variant B of paragraph 3 of draft article 13. It should be noted the these options are not mutually exclusive, since article 7, paragraph (1), of the UNCITRAL Model Law on Electronic Commerce was the basis for the more detailed rules in article 6, paragraph (3), of the UNCITRAL Model Law on Electronic Signatures.

B. Other requirements

90. Articles 8 and 9 of the UNCITRAL Model Law on Electronic Commerce deal with other legal requirements that may create obstacles to electronic commerce, namely, requirements relating to the production of "original" documents or to the retention of documents and records.

91. The preliminary draft convention does not contain provisions dealing with those matters, as they do not appear to be of immediate relevance in the context of contract formation. The Working Group may wish to consider whether the new instrument should incorporate any of those or even other provisions of the Model Law.

Notes

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 209.

[2] The text of the recommendation to UNCITRAL is contained in document TRADE/CEFACT/1999/CRP.7. Its adoption by CEFACT is stated in the report of CEFACT on the work of its fiftieth session (TRADE/CEFACT/1999/19, para. 60).

[3] Ibid. *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 315-318.

[4] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 384-388.

[5] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 285-295.

[6] Ibid., para. 294.

[7] Donnie, L. Kidd, Jr and William Daughtrey, Jr., "Adapting Contract Law to Accommodate Electronic Contracts", *Rutgers Computer and Technology Law Journal*, vol. 26, p. 269, who write further that "[...] an electronic contract is not a special type of contract, but a method of contracting. A special type of contract is identified by the subject matter of the contract rather than the manner in which the contract is formed." (at footnote 239).

[8] Shawn Pompian, "Is the Statute of Frauds Ready for Electronic Contracting?", *Virginia Law Review*, vol. 85, p. 1479.

[9] *Official Records of the United NationsConference on Contracts for the International Sale of Goods: documents of the Conference and summary records of the plenary meetings and of the meetings of the Main Committee* (United Nations publication Sales No. E.81.IV.3), p. 16.

[10] E.g. United Nations Sales Convention, article 1, paragraph (1); Convention on the Limitation Period in the International Sale of Goods (New York, 1974), article 2, subparagraph (a) (hereafter "United Nations Limitation Convention"); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995), article 1, subparagraph (a) (hereafter "United Nations Guarantees Convention").

[11] UNCITRAL Model Law on Electronic Commerce, article 1, first footnote.

[12] E.g. United Nations Sales Convention, article 10(a); United Nations Limitation Convention, article 2(c); United Nations Guarantees Convention, article 4, paragraph (2), subparagraph (a); UNIDROIT Convention on International Financial Leasing (Ottawa, 1988), article 3, paragraph 2 (hereafter, the UNDIROIT Leasing Convention); UNIDROIT Convention on International Factoring (Ottawa, 1988), article 2, paragraph 2 (hereafter "UNDIROIT Factoring Convention").

[13] UNIDROIT Leasing Convention, article 3, subparagraph 1(a); UNIDROIT Factoring Convention, article 2, subparagraph 1(a).

[14] As developed in legal literature, in the absence of a definition of "place of business" in the Convention.

[15] Compare articles 2.1 et seq. of the UNIDROIT Principles of International Commercial Contracts.

[16] Christoph Glatt, "Comparative Issues in the Formation of Electronic Contracts", *International Journal of Law and Information technology*, vol. 6, p.50.

[17] Both issues are, however, addressed in the UNIDROIT Principles on International Commercial Contracts (cf. articles 2.1 et seq).

[18] Allen and Widdison, "Can Computers Make Contracts?" *9 Harvard Journal of Law and Technology* vol. 9, No. 25 (Winter, 1996).

[19] See Oberster Gerichtshof, 6 February 1996, *Österreichische Zeitschrift für Rechtsvergleichung* 248 (1996) = CLOUT case n. 176.

[20] For this statement, see, for instance, Oberlandesgericht München, 8 March 1995, CLOUT case n. 134.

Annex I

Preliminary draft convention[1] on [international] contracts concluded or evidenced by data messages

Chapter I. Sphere of application

Article 1. Scope of application

Variant A[2]

1. This Convention applies to contracts concluded or evidenced by means of data messages.

2. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

[3. A State may declare that it will apply this Convention only to contracts concluded between parties having their places of business in different States or [when the rules of private international law lead to the application of the law of a Contracting State or] when the parties have agreed that it applies.][3]

[4. Where a State makes a declaration pursuant to paragraph 3 the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.]

Variant B[4]

1. This Convention applies to international contracts concluded or evidenced by means of data messages.

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[1] The draft instrument has been prepared in the form of a convention in accordance with the working assumption agreed to at the thirty-eight session of the Working Group (A/CN.9/484, para. 124) and without prejudice to a final decision by the Working Group as to the nature of the instrument.

[2] Variant A departs from the traditional definition of scope of application of international trade law instruments, such as the United Nations Sales Convention, inasmuch as paragraph 1 does not limit the scope of the Convention to "international" contracts. The preliminary draft convention would apply whenever the forum is in a Contracting State, without the need for investigating further the location of the parties (see above, paras. 25-35).

[3] Draft paragraphs 3 and 4 appear within square brackets, as possible additions, in the event that States might wish to preserve the duality of systems for domestic and international contracts. Such an approach was also used in article 1 of the UNCITRAL Model Law on Electronic Commerce

[4] Variant B reflects essentially the scope of application of the United Nations Sales Convention, as set out in its article 1.

2. For the purposes of this Convention a contract is considered international if, at the time of the conclusion of the contract, the parties have their places of business in different States.

3. This Convention also applies [when the rules of private international law lead to the application of the law of a Contracting State or][5] when the parties have agreed that it applies.

[4. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.]

5. [Neither] The nationality of the parties [nor the civil or commercial character of the parties or of the contract] is [not] to be taken into consideration in determining the application of this Convention.

Article 2. Exclusions

This Convention do not apply to the following contracts:

(a) Contracts concluded for personal, family or household purposes;[6]

(b) Contracts granting limited use of intellectual property rights.[7]

(c) [*Other exclusions, such as real estate transactions, to be added by the Working Group.*][8]

Article 3. Matters not governed by this Convention

This Convention governs only the formation of contracts concluded or evidenced by data messages. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

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[5] The phrase "when the rules of private international law lead to the application of the law of a Contracting State" in paragraph 3 of variant A and in paragraph 3 of variant B reproduce a rule that is contained in the provisions on the sphere of application of other UNCITRAL instruments. That phrase appears within square brackets since it might cause an expansion of the scope of application of the draft Convention beyond what was initially contemplated by the Working Group

[6] This provision follows an exclusion contained in article 2 subparagraph (a) of the United Nations Sales Convention, and in most instruments prepared by UNCITRAL. It reflects the initial understanding of the Working Group that the future instrument should not focus on consumer transactions (see above, paras. 15-19).

[7] This exclusion reflects the initial understanding of the Working Group that licensing contracts should be distinguished from other commercial transactions (see above, paras. 20-22). The Working Group may wish to consider whether the wording of the draft paragraph adequately reflects the notion of "licensing contract", as understood by the Working Group.

[8] This draft article might contain additional exclusions, as may be decided by the Working Group. With a view to facilitating the consideration of this issue by the Working Group, Annex II, reproduces, for illustrative purposes and without the intention of being exhaustive, exclusions typically found in domestic laws on electronic commerce.

(a) The validity of the contract or of any of its provisions or of any usage;[9]

(b) The rights and obligations of the parties arising out of the contract or of any of its provisions or of any usage;[10]

(c) The effect which the contract may have on the ownership of rights created or transferred by the contract.[11]

Article 4. Party autonomy

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.[12]

Chapter II. General Provisions

Article 5. Definitions[13]

For the purposes of this Convention:

(a) "Data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

(d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) "Automated computer system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a

[9] Draft subparagraphs (a) and (c) are derived from article 3 of the United Nations Sales Convention.

[10] This provision has been included so as to make it clear that the preliminary draft convention is not concerned with substantive issues arising out of the contract, which, for all other purposes, remains subject to its governing law (see above, paras. 10-12).

[11] Draft subparagraph (c) was based, *mutatis mutandis*, on article 4, subparagraph (b), of the United Nations Sales Convention.

[12] Draft article 4 reflects the general principle of party autonomy, as recognized in several UNCITRAL instruments. The Working Group may wish to consider, however, whether some limitation to this principle might be appropriate or desirable in the context of the preliminary draft convention, in particular in the light of provisions such as draft articles 12, paragraph 2, and 14.

[13] The definitions contained in draft paragraphs (a) to (d) and (f) are derived from article 2 of the UNCITRAL Model Law on Electronic Commerce.

natural person at each time an action is initiated or a response is generated by the system.[14]

(f) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages;

(g) "Offeror" means a natural person or legal entity that offers goods or services; [15]

(h) "Offeree" means a natural person or legal entity that receives or retrieves an offer of goods or services;

Variant A:[16]

[*(i)* "Signature" includes any method used for identifying the originator of a message and indicating that the information contained in the message is attributable to the originator;]

Variant B:[17]

[*(i)* "Electronic signature" means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the person holding the signature creation data in relation to the data message and indicate that person's approval of the information contained in the data message;

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[14] This definition is based on the definition of "electronic agent" contained in section 2 (6) of the United States Uniform Electronic Transactions Act"; a similar definition is also used in section 19 of the Uniform Electronic Commerce Act of Canada". This definition was included in view of the provisions of draft article 12.

[15] The proposed definitions of "offeror" and "offeree" (draft subparagraphs (g) and (h), respectively) have been included in view of the fact that those expressions are used in draft articles 8 and 9, in a context in which they might not easily be replaced with the words "originator" or "addressee".

[16] Variant A is proposed in the event that the Working Group would wish to include in the preliminary draft convention only a general provision on the recognition of electronic signatures, along the lines of article 7 of the UNCITRAL Model Law on Electronic Commerce. Following the example of recent uniform legislation enacting the Model Law in Canada (Uniform Electronic Commerce Act) and the United States (Uniform Electronic Transactions Act), the definition of electronic signature in Variant A includes the notion of "attribution", which is also used, although in a different context, in article 13 of the UNCITRAL Model Law (see also draft article 13, paragraph 3, Variant A).

[17] Variant B reproduces the definition of electronic signature contained in article 2 (a) of the UNCITRAL Model Law on Electronic Signatures (see A/CN.9/493). The Working Group may wish to use this definition in the event that it feels necessary to include more specific requirements for the recognition of electronic signatures, along the lines of article 6, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures (see draft article 13, paragraph 3, Variant B).

Variant A:[18]

[*(j)* "Place of business" means any place of operations where a person carries out a non-transitory activity with human means and goods or services;]

Variant B:[19]

[*(j)* "Place of business" means the place where a party pursues an economic activity through a stable establishment for an indefinite period;]

(k) "Person" and "party" include natural persons and legal entities.[20]

[*(l)* Other definitions that the Working Group may wish to add.][21]

Article 6. Interpretation[22]

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 7. Location of the parties

1. For the purposes of this Convention, a party is presumed to have its place of business at the geographic location indicated by it in accordance with article 14 [, unless it is manifest and clear that the party does not have a place of business at

[18] The proposed definition of "place of business", in variant A of draft subparagraph (j), reflects the essential elements of the notions of "place of business", as understood in international commercial practice, and "establishment", as used in article 2 subparagraph (f) of the UNCITRAL Model Law on Cross-Border Insolvency. The proposed definition appears within square brackets in view of the fact that, although having repeatedly used the concept of "place of business" in its various instruments, the Commission has thus far not defined such concept. Nevertheless, the Working Group may wish to consider the desirability of providing a uniform definition of "place of business" for the purpose of enhancing legal certainty and promoting uniformity in the application of the Convention. The proposed definition might also be regarded as a necessary complement to draft article 7, in particular its paragraph 1.

[19] Variant B of draft subparagraph (j) contains an alternative definition of place of business, which follows the understanding given to this expression within the European Union (see paragraph (19) of the preamble to the Directive 2000/31/EC of the European Union).

[20] This definition is offered to make it clear that when using the words "person" or "party" without further qualification, the preliminary draft convention is referring to both natural persons and legal entities. The Working Group may wish to note that, during the preparation of the UNCITRAL Model Law on Electronic Commerce it was felt that such a definition did not belong in the text of the instrument, but in its guide to enactment.

[21] The Working Group may wish to consider the need for or desirability of including definitions for other terms used in the preliminary draft convention, such as "signatory" (if Variant B of draft article 13 is adopted), "Internet", "web site", "domain name".

[22] This draft article mirrors article 7 of the United Nations Sales Convention and similar provisions in other UNCITRAL instruments.

such location and that such indication is made solely to trigger or avoid the application of this Convention].[23]

2. If a party has more than one place of business, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.[24]

3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

4. The location of the equipment and technology supporting an information system used by a legal entity for the conclusion of a contract, or the place from which such information system may be accessed by other persons, in and of themselves, do not constitute a place of business [, unless such legal entity does not have a place of business].[25]

5. The sole fact that a person makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in such country.[26]

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[23] Draft article 7 is one of the central provisions in the preliminary draft convention, and one which might be essential, if the sphere of application of the preliminary draft convention is defined along the lines of variant A of draft article 1. Draft paragraph 1 builds upon a proposal that was made at the thirty-eighth session of the Working Group, to the effect that the parties in electronic transactions should have the duty to disclose their places of business (A/CN.9/484, para. 103). That duty is reflected in draft article 14, paragraph 1, subparagraph (b). In line with the spirit of the Working Group's consideration of this matter at its thirty-eighth session (A/CN.9/484, paras. 96-104), draft paragraph 1 is not intended to create a new concept of "place of business". If the Working Group considers that specific provisions should be made to prevent fraud (see above, para. 39), the Working Group may wish to add language along the lines suggested in the phrase within square brackets. It should be noted that the phrase within square brackets is intended to prevent fraud, but not to limit the parties' ability to agree on the applicability of the Convention under draft article 1 (paragraph 3 in variant A and paragraph 2 in variant B), or otherwise interfere with the parties' right to choose the applicable law.

[24] Draft paragraphs 2 and 3 reflect traditional rules applied to determine a party's place of business (see, for instance, United Nations Sales Convention, article 10).

[25] This draft paragraph proposes a rule specifically concerned with issues raised by the use of electronic means of communication in contract formation. The draft paragraph is intended to reflect an opinion shared by many delegations participating at the thirty-eighth session of the Working Group that, when dealing with the location of the parties, the Working Group should take care to avoid devising rules that would result in any given party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (A/CN.9/484, para. 103). The draft paragraph follows the solution proposed in paragraph (19) of the preamble to the Directive 2000/31/EC of the European Union. The phrase within square brackets is intended to deal only with so-called "virtual companies" and not with natural persons, who are covered by the rule contained in draft paragraph 3.

[26] This draft paragraph takes into account the fact that the current system for assignment of domain names was not originally conceived in geographical terms and that, therefore, the apparent connection between a domain name and a country does not, in and of itself, suffice to conclude that there is a genuine and permanent link between the domain name user and the country (see above, para. 44-46).

Chapter III. Formation of contracts

Article 8. Time of contract formation[27]

1. A contract is concluded at the moment when the acceptance of an offer becomes effective in accordance with the provisions of this Convention.

2. An offer becomes effective when it is received by the offeree.

3. An acceptance of an offer becomes effective at the moment the indication of assent is received by the offeror.

Article 9. Invitations to make offers

1. A proposal for concluding a contract which is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, such as the offer of goods and services through an Internet web site, is to be considered merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance.[28]

2. In determining the intent of a party to be bound in case of acceptance, due consideration is to be given to all relevant circumstances of the case. Unless otherwise indicated by the offeror, the offer of goods or services through automated computer systems allowing the contract to be concluded automatically and without human intervention is presumed to indicate the intention of the offeror to be bound in case of acceptance.[29]

[27] Each paragraph of this draft article reflects the essence of the rules on contract formation contained, respectively, in articles 23, 15, paragraph (1), and 18, paragraph (2), of the United Nations Sales Convention. The verb "reach", which is used in the United Nations Sales Convention, has been replaced with the verb "receive" in the draft article so as to align it with draft article 11, which is based on article 15 of the UNCITRAL Model Law on Electronic Commerce.

[28] This provision, which is inspired in article 14, paragraph (1), of the United Nations Sales Convention, is intended to clarify an issue that has raised considerable amount of discussion since the advent of the Internet. The proposed results from an analogy between offers made by electronic means and offers made through more traditional means (see paras. 52-54).

[29] Paragraph 2 offers criteria for determining a party's intention to be bound in case of acceptance. The first sentence is based on the general rule on interpretation of a party's consent, which is contained in paragraph 3 of article 8 of the United Nations sales Convention. The rule proposed in the second sentence of this paragraph is similar to the rule proposed in legal writings for the functioning of automatic vending machines (see para. 54).

Article 10. Use of data messages in contract formation[30]

1. Unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages [or other actions communicated electronically in a manner that is intended to express the offer or acceptance, including, but not limited to, touching or clicking on a designated icon or place on a computer screen].

2. Where data messages are used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.

Article 11. Time and place of dispatch and receipt of data messages[31]

1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

2. Unless otherwise agreed by the parties, if the addressee has designated an information system for the purpose of receiving data messages, the data message is deemed to be received at the time when it enters the designated information system; if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee. If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.[32]

3. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph 5 of this article.

4. Unless otherwise agreed by the parties, when the originator and the addressee use the same information system, both the dispatch and the receipt of a

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[30] The rules contained in this draft article are based on article 11, paragraph (1), of the UNCITRAL Model Law on Electronic Commerce. The phrase "or other actions communicated electronically", and the reference, for illustrative purposes, to "touching or clicking on a designated icon or place on a computer screen", which are derived from section 20, paragraph (1), subparagraph (b) of the Uniform Electronic Commerce Act of Canada, are intended to clarify, rather than expand the scope of the rule contained in the Model Law. They appear within square brackets, however, in the event that the Working Group finds that such additional clarification is not needed.

[31] Except for draft paragraph 4, the rules contained in this draft article are based on article 15 of the UNCITRAL Model Law on Electronic Commerce, with some adjustments to harmonize the style of the individual provisions with the style used elsewhere in the draft Convention, which follows more closely the style of the United Nations Sales Convention.

[32] Draft paragraph 2 does not add further requirements to those set forth in article 15, paragraph (2), of the Model Law, unlike some domestic legislative texts based on the Model Law that generally require that a message should be "in a form capable of being retrieved and processed by [the addressee's] system"(United States Uniform Electronic Transactions Act, section 15 (b) (1) (2)), or "capable of being retrieved and processed by the addressee" (Uniform Electronic Commerce Act of Canada, section 23 (2)) and not only when both parties use the same system.

data message occur when the data message becomes capable of being retrieved and processed by the addressee.[33]

5. Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 7 .

Article 12. Automated transactions

1. Unless otherwise agreed by the parties, a contract may be formed by the interaction of an automated computer system and a natural person or by the interaction of automated computer systems, even if no natural person reviewed each of the individual actions carried out by such systems or the resulting agreement.[34]

2. Unless otherwise [expressly] agreed by the parties, a party offering goods or services through an automated computer system shall make available to the parties that use the system technical means allowing the parties to identify and correct errors prior to the conclusion of a contract. The technical means to be made available pursuant to this paragraph shall be appropriate, effective and accessible.[35]

[3. A contract concluded by a natural person that accesses an automated computer system of another person has no legal effect and is not enforceable if the natural person made a material error in a data message and[36]

[33] This draft paragraph deals with cases where both the originator and the addressee use the same communication system. In such a case, the criterion used in draft paragraph 1 cannot be used, since the message remains in a system which cannot be said to be "outside the control of the originator". The rule proposed in the draft paragraph provides for simultaneous dispatch and receipt of a data message "when it becomes capable of being retrieved and processed by the addressee". This situation was not contemplated by article 15, paragraph (1), of the Model Law. It is submitted, however, that the proposed rule, which is inspired in section 23 (2) (a) of the Uniform Electronic Commerce Act of Canada, does not conflict with the rules contained in Article 15 of the Model Law.

[34] This draft provision develops further a principle formulated in general terms in article 13, paragraph (2), subparagraph (b), of the UNCITRAL Model Law on Electronic Commerce. The draft paragraph does not innovate on the current understanding of legal effects of automated transactions, as expressed by the Working Group (A/CN.9/484, para. 106) that a contract resulting from the interaction of a computer with another computer or person is attributable to the person in whose name the contract is entered into.

[35] This draft paragraph deals with the issue of errors in automated transactions (see above, paras. 74-79). The rule contained in the draft paragraph, which is inspired in article 11, paragraph 2, of Directive 2000/31/EC of the European Union, creates an obligation, for persons offering goods or services through automated computer systems, to offer means for correcting input errors. The Working Group may wish to consider whether the possibility of derogation by agreement needs to be expressly made or can result from tacit agreement, for instance, when a party proceeds to place an order through the seller's automated computer system even though it is apparent to such party that the system does not provide an opportunity to correct input errors.

[36] Draft paragraph 3 deals with the legal effects of errors made by a natural person communicating with an automated computer system. The draft provision, which is inspired in section 22 of the Uniform Electronic Commerce Act of Canada, appears in square brackets because in the consultations held by the Secretariat it has been suggested that a provision of this type might not be appropriate in the context of commercial (i.e. non-consumer) transactions, since the right to repudiate a contract in case of material error may not always be provided under general contract law.

(a) The automated computer system did not provide the natural person with an opportunity to prevent or correct the error;

(b) The natural person notifies the other person of the error as soon as practicable when the natural person learns of it and indicates that he or she made an error in the data message;

(c) The natural person takes reasonable steps, including steps that conform to the other person's instructions to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; and

(d) The natural person has not used or received any material benefit or value from the goods or services, if any, received from the other person.]

Article 13. Form requirements[37]

1. Nothing in this Convention requires a contract to be concluded in or evidenced by writing or subjects a contract to any other requirement as to form.[38]

2. Where the law requires that a contract to which this Convention applies should be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.[39]

Variant A[40]

3. Where the law requires that a contract to which this Convention applies should be signed, that requirement is met in relation to a data message if:

(a) A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) That method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

Variant B [41]

3. Where the law requires that a contract to which this Convention applies should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if an electronic signature is used

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[37] This draft article combines essential provisions on form requirements of the United Nations Sales Convention (article 11) with provisions of articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce.

[38] This provision restates the general principle of freedom of form contained in article 11 of the United Nations Sales Convention.

[39] This provision sets forth the criteria for the functional equivalence between data messages and paper documents, in the same manner as article 6 of the UNCITRAL Model Law on Electronic Commerce.

[40] Variant A recites the general criteria for the functional equivalence between hand-written signatures and electronic identification methods referred to in article 7 of the UNCITRAL Model Law on Electronic Commerce.

[41] Variant B is based on article 6, paragraph 3, of the draft UNCITRAL Model Law on Electronic Signatures.

which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

4. An electronic signature is considered to be reliable for the purposes of satisfying the requirements referred to in paragraph 3 if:

(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) Where the purpose of the legal requirement for a signature is to provide assurances as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

5. Paragraph 4 does not limit the ability of any person:

(a) To establish in any other way, for the purposes of satisfying the requirement referred to in paragraph 3, the reliability of an electronic signature;

(b) To adduce evidence of the non-reliability of an electronic signature.

Article 14. General information to be provided by the parties[42]

1. A party offering goods or services through an information system that is generally accessible to the public shall render the following information available to parties accessing such information system:

(a) Its name and, where the party is registered in a trade or similar public register, the trade register in which the party is entered and its registration number, or equivalent means of identification in that register;

(b) The geographic location and address at which the party has its place of business;

(c) Details, including its electronic mail address, which allow the party to be contacted rapidly and communicated with in a direct and effective manner.

2. A party offering goods or services through an information system that is generally accessible to the public shall ensure that the information required to be provided under paragraph 1 is easily, directly and permanently accessible to parties accessing the information system.

[42] This draft Article is intended to enhance certainty and clarity in international transactions by ensuring that a party offering goods or services through open networks, such as the Internet, should offer at least information on its identity, legal status, location and address. It reflects the proposal, which was positively received at the Working Group's thirty-eighth session, that persons and companies making use of such open networks should at least disclose their places of business (A/CN.9/484, para. 103). The draft provision is inspired in article 5, paragraph (1), of the Directive 2000/31/EC of the European Union.

Article 15. Availability of contract terms[43]

A party offering goods or services through an information system that is generally accessible to the public shall make the data message or messages which contain the contract terms and general conditions available to the other party for a reasonable period of time in a way that allows for their storage and reproduction. A data message is deemed not to be capable of being stored or reproduced if the originator inhibits the printing or storage of the data message or messages by the other party.

[*Other provisions which the Working Group may wish to include.*]

[43] This draft article deals with a particular problem of electronic contracting: the availability of a record of the contract. The draft article, which is based on article 10, paragraph 3, of the Directive 2000/31/EC of the European Union, requires a party offering goods or services through open information systems to ensure that its contracting partners would be able, for a reasonable amount of time, to print or store the data messages containing the contract terms.

Annex II

Common exclusions from the sphere of application of domestic or regional laws that recognize the legal effect of electronic messages and signatures

Bermuda, The Electronic Transactions Act 1999

"Exclusions

"6 (1) Part II (legal requirements respecting electronic records) and Part III (communication of electronic records) do not apply to any rule of law requiring writing or signatures for the following matters—

"(a) the creation, execution or revocation of a will or testamentary instrument;

"(b) the conveyance of real property or the transfer of any interest in real property.

"(2) The Minister may by regulations provide that this Act, or such provisions thereof as may be specified in the regulations, does not apply to any class of transactions, persons, matters or things specified in the regulations."

Canada, Uniform Electronic Commerce Act

"(2) The [appropriate authority] may, by [statutory instrument], specify provisions of or requirements under [enacting jurisdiction] law in respect of which this Act does not apply.

"(3) This Act does not apply in respect of

"(a) wills and their codicils;

"(b) trusts created by wills or by codicils to wills;

"(c) powers of attorney, to the extent that they are in respect of the financial affairs or personal care of an individual;

"(d) documents that create or transfer interests in land and that require registration to be effective against third parties.

"(4) Except for Part 3, this Act does not apply in respect of negotiable instruments, including negotiable documents of title.

"(5) Nothing in this Act limits the operation of any provision of [enacting jurisdiction] law that expressly authorizes, prohibits or regulates the use of electronic documents."

European Union, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

"Article 9

"Treatment of contracts

"1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

"2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

"(a) contracts that create or transfer rights in real estate, except for rental rights;

"(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

"(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

"(d) contracts governed by family law or by the law of succession."

Hong Kong, China, Ordinance No. 1 of 2000 (Electronic Commerce Ordinance)

"Schedule 1

"Matters excluded from application of sections 5, 6, 7, 8 and 17 of this ordinance under section 3 of this ordinance

"1. The creation, execution, variation, revocation, revival or rectification of a will, codicil or any other testamentary document.

"2. The creation, execution, variation or revocation of a trust (other than resulting, implied or constructive trusts).

"3. The creation, execution, variation or revocation of a power of attorney.

"4. The making, execution or making and execution of any instrument which is required to be stamped or endorsed under the Stamp Duty Ordinance (Cap. 117) other than a contract note to which an agreement under section 5A of that Ordinance relates.

"5. Government conditions of grant and Government leases.

"6. Any deed, conveyance or other document or instrument in writing, judgments, and lis pendens referred to in the Land Registration Ordinance (Cap. 128) by which any parcels of ground tenements or premises in Hong Kong may be affected.

"7. Any assignment, mortgage or legal charge within the meaning of the Conveyancing and

Property Ordinance (Cap. 219) or any other contract relating to or effecting the disposition of immovable property or an interest in immovable property.

"8. A document effecting a floating charge referred to in section 2A of the Land Registration

Ordinance (Cap. 128).

"9. Oaths and affidavits.

"10. Statutory declarations.

"11. Judgments (in addition to those referred to in section 6) or orders of court.

"12. A warrant issued by a court or a magistrate.

"13. Negotiable instruments."

Ireland, Electronic Commerce Act, 2000

"10.—(1) *Sections 12* to *23* are without prejudice to

"(a) the law governing the creation, execution, amendment, variation or revocation of

(i) a will, codicil or any other testamentary instrument to which the Succession Act, 1965, applies,

(ii) a trust, or

(iii) an enduring power of attorney,

"(b) the law governing the manner in which an interest in real property (including a leasehold interest in such property) may be created, acquired, disposed of or registered, other than contracts (whether or not under seal) for the creation, acquisition or disposal of such interests,

"(c) the law governing the making of an affidavit or a statutory or sworn declaration, or requiring or permitting the use of one for any purpose, or

"(d) the rules, practices or procedures of a court or tribunal, except to the extent that regulations under section 3 may from time to time prescribe.

"11.—Nothing in this Act shall prejudice the operation of

"(a) any law relating to the imposition, collection or recovery of taxation or other Government imposts, including fees, fines and penalties,

"(b) the Companies Act, 1990 (Uncertificated Securities) Regulations, 1996 (S.I. No. 68 of 1996) or any regulations made in substitution for those regulations,

"(c) the Criminal Evidence Act, 1992, or

"(d) the Consumer Credit Act, 1995, or any regulations made thereunder and the European Communities."

Slovenia, Electronic Commerce and Electronic Signature Act

"Article 13

"(1) Where the law or any other regulation requires information to be in writing, that requirement is met by an electronic message, if the information contained therein is accessible so as to be usable for subsequent reference.

"(2) The provisions of the previous paragraph do not apply to:

"1. contracts regulating property and other rights and other rights on immovable things;

"2. contracts regulating testaments;

"3. contracts regulating property relationships between spouses;

"4. contracts of disposal of property belonging to persons who have been dispossessed of legal capacity;

"5. contracts of tradition and division of property inter vivos;

"6. contracts of life-subsistence and agreements of waiver of heirship prior to inheritance;

"7. contracts of donations and contracts of donations mortis causa;

"8. contracts of sale with the retention of ownership;

"9. other legal acts, which shall be, according to legal provisions, made in a form of a notarial note."

United States of America, Uniform Electronic Transactions Act

"Section 3. Scope[1]

"(a) Except as otherwise provided in subsection (b), this [Act] applies to electronic records and electronic signatures relating to a transaction.

"(b) This [Act] does not apply to a transaction to the extent it is governed by:

"(1) a law governing the creation and execution of wills, codicils, or testamentary trusts;

"(2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];[2]

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[1] The official commentary to the Uniform Electronic Transactions Act states that the Act "is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters". Thus, "transactions with no relation to business, commercial or governmental transactions would not be subject to [the] Act." Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by the Act.

[2] Paragraph (2) excludes all of the Uniform Commercial Code other than its Sections 1-107 (waiver or renunciation of claim or right after breach) and 1-206 (writing requirement for contracts for sale of personal property), and articles 2 and 2A (sales and leases). The excluded provisions of the Uniform Commercial Code deal with negotiable instruments (article 3), bank deposits (article 4) and funds transfers (article 4A); letters of credit (article 5), bulk transfers and bulk sales (article 6); warehouse receipts, bills of lading and other documents of title

"(3) [the Uniform Computer Information Transactions Act];[3] and

"(4) [other laws, if any, identified by State]."[4]

(article 7), investment securities (article 8); secured transactions, sales of accounts and chattel paper (article 9). The official commentary to the Uniform Electronic Transactions Act indicates that "the check collection and electronic fund transfer systems governed by Articles 3, 4 and 4A involve systems and relationships involving numerous parties beyond the parties to the underlying contract" and that "the impact of validating electronic media in such systems involves considerations beyond the scope of this Act". Articles 5, 8 and 9 of the Uniform Commercial Code, in turn, were not excluded because the subject matter was not appropriate for being governed by the Uniform electronic Transactions Act, but "because the revision process relating to those Articles included significant consideration of electronic practices."

[3] The Uniform Computer Information Transactions Act deals specifically with transactions involving computer information.

[4] The official commentary indicates that additional exclusions under subparagraph (b) (4) should be limited to laws which govern electronic records and signatures which may be used in transactions as defined in the Act Section 2 (16) (i.e. "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs"). The official commentary discusses at length the need for and the appropriateness of generally excluding the following matters from the scope of the Act: trusts (other than testamentary trusts); powers of attorney; real estate transactions between the parties (as opposed to their effect on third parties) and matters governed by consumer protection statutes. The commentary indicates that the Drafting Committee of the Electronic Transactions Act determined that exclusion of these additional areas was not warranted, partly in view of the enabling nature of the Act and the fact that section 8 (b) (3) specifically preserves the applicability of requirements provisions such as "laws requiring information to be presented in particular fonts, formats or in similar fashion, as well as laws requiring conspicuous displays of information".